Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1296

UNITED STATES NAVIGATION INC.,

and

SCINDIA STEAM NAVIGATION CO., LTD.,

Petitioners,

—against—

JOHN ESPOSITO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. .....

UNITED STATES NAVIGATION INC.,

and

SCINDIA STEAM NAVIGATION CO., LTD.,

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—against—

JOHN ESPOSITO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered herein on October 17, 1977.

Opinion Below

There is no opinion by the Court of Appeals, which summarily affirmed on the unreported District Court opinion, printed in app'x A.

Jurisdiction

The judgment of the Court of Appeals dated and entered October 17, 1977, is printed in app'x B. The orders of the Court of Appeals dated January 4, 1978, denying timely petition for rehearing and suggestion for rehearing in banc, are printed in app'xes C and D. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a demise charterer is liable without negligence for personal injury caused by a latent defect existing before the demise?

2. If the answer to 1 is affirmative, whether the demisee's undisclosed principal is liable on ground of *respondeat superior*?

3. Regardless of the answers to 1 and 2, whether the Court of Appeals' summary affirmance warrants an exercise of this Court's power of supervision?

Statement

Invoking 28 U.S.C. 1333(1) admiralty jurisdiction, respondent Esposito, a longshoreman, sued petitioners U.S. Navigation, a steamship agency, and Scindia, a shipowner, in the United States District Court for Eastern New York to recover damages for personal injury caused by a "defect in the beams supporting the deck [of a barge, which] could not be discovered by a reasonable inspection * * * a latent defect" (app'x A, pp. 5a-6a). The defect

existed before U.S. Navigation hired the barge, and was unknown to U.S. Navigation before Esposito's injury.

The barge was used to receive cargo discharged from Scindia's ship. While Esposito was stowing some of that cargo, a portion of the barge's deck on which he had walked more than 30 times, and which "appeared to be safe and able to support the weight of the longshoremen and cargo" (app'x A, p. 3a), unexpectedly gave way because of the latent defect in the supporting beams.

After bifurcated trial of the liability issues, Chief Judge Mishler found that U.S. "Navigation acted independently in the hiring" of the barge (app'x A, p. 4a) as "agent of an undisclosed principal" (app'x A, p. 5a), and held U.S. Navigation liable as "demise charterer of the barge" (app'x A, p. 4a) and Scindia liable "on the traditional concept of respondeat superior [that] * * * [t]he undisclosed principal is liable for the acts of its agent performed within the scope of the agency" (app'x A, pp. 4a, 5a). He dismissed petitioners' indemnity claim against Esposito's employer because the latent defect was not reasonably discoverable, and subsequently awarded Esposito 100% of his recoverable damages, thereby implicitly finding that Esposito was not contributorily negligent.

Petitioners appealed solely the question of their liability to Esposito. The Court of Appeals summarily affirmed "on the opinion of Chief Judge Mishler below" (app'x B) and denied petitioners' timely petition for rehearing (app'x C) and suggestion for rehearing in banc (app'x D).

Reasons for Granting the Writ

I

The holding that a demisee is liable without negligence for personal injury caused by a latent, unknown, not reasonably discoverable defect existing before the demise is unprecedented, and raises an important question which should be settled by this Court because of its "responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald* v. *United States Lines,* 374 U.S. 16, 20 (1963); *United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 409 (1975).

The question is commercially important because steamship agents constantly hire barges and other harbor craft for use by their principals and, until the opinion below, neither did, nor considered it necessary to, obtain costly insurance against liability for non-negligent injuries, damages, or losses occurring during the hire period, and because demisees customarily rely on demisors' express or implied seaworthiness warranties at the time the demise commences and do not deem it either requisite or desirable to otherwise protect themselves against non-negligent liability for pre-demise unseaworthiness.

The question is legally important because the holding below is contrary to the rationale of the personal obligation relationship to unseaworthiness liability which the Court has twice granted certiorari to consider, and then left undecided because of other considerations. *Guzman* v. *Pichirilo,* 369 U.S. 698, 699, 700 (1962); *Reed* v. *The Yaka,* 373 U.S. 410, 411, 412 (1963); *cf.,* the dissents in *Guzman,* p. 704, and *Reed,* p. 419 n.2. It seems reasonably

settled in light of decisions such as *Cannella* v. *Lykes Bros. S.S. Co.,* 174 F. 2d 794, 795-797 (2 Cir. 1949), cert. den. 338 U.S. 859 (1949), that, although a demised ship can be sued *in rem* for both pre-demise and post-demise unseaworthiness, a non-negligent demisor is personally liable only for pre-demise unseaworthiness, and a non-negligent demisee is personally liable for post-demise unseaworthiness. What is not, but should be, settled, consistent with those rules of admiralty law and with the personal obligation relationship to unseaworthiness liability persuasively substantiated in *Ruiz Pichirilo* v. *Maysonet Guzman,* 290 F. 2d 812, 814-815 (1 Cir. 1961), rev'd on other grounds *sub nom. Guzman* v. *Pichirilo,* 369 U.S. 698 (1962), and reaffirmed in *Ramos* v. *Beauregard, Inc.,* 423 F. 2d 916, 917-918 (1 Cir. 1970), cert. den. 400 U.S. 865 (1970), is whether a non-negligent demisee can be held personally liable for pre-demise unseaworthiness.

II

The holding that a demisee's undisclosed principal is liable for unseaworthiness on the *respondeat superior* "concept" that "[t]he undisclosed principal is liable for the acts of its agent performed within the scope of the agency" (app'x A, p. 5a) is "such a significant departure from longstanding principles of [admiralty and agency] law that the petition for certiorari should be granted." *Cf., Roanwell Corp.* v. *Plantronics, Inc.,* 429 U.S. 1004, 1005 n.2, 1009 (1976), dissent by Mr. Justice White, joined by Mr. Justice Brennan, where the "Court of Appeals for the Second Circuit affirmed in a short, uncritical, *per curiam* opinion • • • a significant departure from longstanding principles of patent law".

Liability for unseaworthiness "is peculiarly and exclusively the obligation of the owner", *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 100 (1946), or owner *pro hac vice, Reed* v. *The Yaka,* 373 U.S. 410, 412-413 (1963), and is "a species of liability without fault * * * a form of absolute duty". *Seas Shipping Co.,* pp. 94-95; *Mitchell* v. *Trawler Racer, Inc.,* 362 U.S. 539, 549 (1960). Non-negligent U.S. Navigation committed no "acts" for which its principal can properly be held secondarily liable on the ground of *respondeat superior.* If U.S. Navigation is liable as demisee-owner *pro hac vice* for the barge's latent unseaworthiness, that liability is "exclusive".

III

The Court of Appeals' summary affirmance, and reaffirmance, of an opinion which either vitiates or transforms fundamental law, and is either plainly wrong or so obscurely right as to mystify entire law firms, "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Sup. Ct. Rule 19.1(b).

> "Traditionally, then, the function of the appellate court has been to expound what the law should be. As chief oracle, by virtue of authority and prestige, it has furnished a pattern of thought by which lower courts, lawyers, and laymen might guide themselves—a refining process by which judicial dross has been separated from the gold. A serious undermining of that function has come about through the practice, common in several appellate courts, of affirming decisions without opinion." Marcus, Affirmance Without Opinion, 6 Fordham L.Rev. 212, 213 (1937).

> "A most important function is the writing of opinions. Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons is the thing out of which law—and particularly Judge-made law—grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like. All Judges know that in some cases this latter factor may almost completely transcend the importance of the case which is the vehicle bringing the questions forward." *NLRB* v. *Amalgamated Clothing Workers,* 430 F. 2d 966, 972 (5 Cir. 1970).

> "The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed [in the Second, Fifth, and Sixth Circuits] that the due process clause of the Constitution should be held to require courts of appeals to write at least a brief statement of the reasons for their decisions." Commission for Revision of the Federal Court Appellate System, Structure & Internal Procedures: Recommendations for Change 69 (1975).

> "[W]e recommend that in every case there be some record, however brief, and whatever the form, of

> reasoning which impelled the decision. • • • Opinions can be signed or unsigned, published or unpublished, but in each case the litigants and their attorneys would be apprised of the reasoning which underlies the conclusion of the court." Commission on Revision of the Federal Court Appellate System, Structure & Internal Procedures: Recommendations for Change 73 (1975).

While "courts of appeals should have wide latitude in their decisions of whether or how to write opinions • • • especially • • • with respect to summary affirmances", *Taylor* v. *McKeithen,* 407 U.S. 191, 194 n.4 (1972), that discretion is not absolute and resort to affirmances without opinions "is certainly not to be encouraged in other than clearly deserving cases." Haworth, Screening & Summary Procedures in the United States Courts of Appeals, 1973 Wash. Univ. L.Q. 257, 272. There are "factors which would make application of the Rule [permitting affirmance without opinion] wrong or unwise or inappropriate", *NLRB* v. *Amalgamated Clothing Workers, supra,* 430 F. 2d, p. 973, and there are "cases in which an opinion by the Court seems • • • necessary, not merely to resolve an issue concededly present, but to denominate for the benefit of the parties and the District Court what issues the Court conceives to be resolved by its summary affirmance." *Buchanan* v. *Evans,* 423 U.S. 963, 975 (1975), dissent by Mr. Justice Rehnquist, joined in relevant part by the Chief Justice and Mr. Justice Powell. The Court has granted certiorari and remanded for elucidation when it was not clear that a court of appeals' summary disposition correctly applied the proper determinative standards. *E.g., Taylor* v. *McKeithen, supra,* 407 U.S., p. 194; *Will* v. *United States,* 389 U.S. 90, 104, 107 (1967); *Northcross* v. *Memphis Board of Education,* 412 U.S. 427, 428-429 (1973).

Vindicating the Fifth Circuit's summary disposition Rule 21, printed in app'x E, which, unlike the Second Circuit's Rule § 0.23, also printed in app'x E, has more specific safeguards and is limited to affirmances, Chief Judge Brown avowed that Rule 21 "must be carefully and selectively employed. • • • This means that • • • it must be sparingly used." *NLRB* v. *Amalgamated Clothing Workers, supra,* 430 F. 2d, p. 972. The Second Circuit's Rule § 0.23 has not been sparingly used. During the past 10 years the ratio between its Rule § 0.23 dispositions and total decisions has risen from 11.5% to an alarming 54%, United States Courts, Second Circuit Report 1977, p. 20, Table 1, and, like a scythe, has been used to summarily affirm, dismiss, grant or deny enforcement, modify, remand, reverse, or vacate. 556 F. 2d 554-563; 559 F. 2d 1202-1206; 562 F. 2d 37-40.

A brief explication by the Court of Appeals of its affirmance that petitioners were properly held liable would not be supererogatory; would not have unreasonably added to that Court's burden; and would have lessened this Court's burden.

Conclusion

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

WILLIAM M. KIMBALL
Counsel for Petitioners

New York, N.Y.
March 16, 1978

Appendices

APPENDIX A

District Court Opinion on Liability

(Filed February 16, 1977)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Civil 655

JOHN ESPOSITO,

Plaintiff,

—against—

UNITED STATES NAVIGATION INC.

—and—

SCINDIA STEAM NAVIGATION CO. LTD.,

Defendants.

SCINDIA STEAM NAVIGATION CO. LTD.,

Third-Party Plaintiff,

—against—

INTERNATIONAL TERMINAL OPERATING CO. INC.,

Third-Party Defendant.

MISHLER, CH. J.

This is an action for personal injuries by a longshoreman employed by International Terminal Operating Co. Inc. ("ITO"), against Scindia Steam Navigation Company,

Ltd. ("Scindia"), the owner of cargo vessel M/V "Jaladhanya" and United States Navigation, Inc. ("Navigation"), Scindia's agent. Esposito was injured aboard a barge on March 18, 1969, while engaged in stowing bales of hemp discharged from the #5 hatch of the Jaladhanya onto the deck of the barge. Defendant—third-party plaintiff—seeks indemity from ITO. The trial on the issue of liability was conducted by the court without a jury. The court finds as follows:

The M/V Jaladhanya, owned by Scindia, arrived at Pier 12 in Brooklyn, New York, on March 13, 1969, with a cargo of hemp and similar merchandise. Its ultimate destination was Boston. Because of a strike of longshoremen in Boston Harbor, defendants decided to transfer the cargo to a sister cargo vessel, the M/V "Jalagopal", which was berthed at Pier 9. Navigation had a barge, "P-98", for an indefinite term since February 29, 1969, which was owned by Petterson Lighterage and Towing Corp.[1] The barge was without motor power. The oral charter was on a day-to-day basis at $80 per day, and included the services of Hubert E. Reel, who was described as the "captain" of the barge. During this period, the barge and its "captain" were under the direct control of Navigation. Reel's duties with relation to the barge consisted of securing the lines and acting as a watchman over its cargo. When directed by the ship's personnel, he made a check of the cargo and reported it back.

[1] Plaintiff commenced an action against Petterson in this court on March 25, 1970 (70 C 362). Petterson filed a petition in bankruptcy on May 11, 1970, in the United States District Court for the Southern District of New York. Plaintiff thereupon abandoned the claim against Petterson. The case was dismissed for failure to appear on December 11, 1973. The complaint in the case at bar was filed on May 10, 1973.

On the morning of March 18, 1969, Navigation assigned barge "P-98" to the service of the Jaladhanya. The barge was towed by tug to the stern of the Jaladhanya. Reel was aboard the barge during the towing operation. The deck of the barge was a patchwork, consisting of boards of various sizes and dimensions placed over supporting beams. The shell leaked and required bilge pumps to keep it afloat.

ITO commenced discharging the cargo from the Jaladhanya at about 8:00 A. M., soon after the barge was secured. The ship's winch removed the bales of hemp from the #5 hatch and placed them on the pier. A crane then moved the cargo from the pier onto the barge. Plaintiff and another longshoreman aboard the barge removed the bridle from the draft, and a hilo operator then stowed the bales of hemp. At about 8:00 P. M. on March 18, 1969, plaintiff walked toward a draft that had landed on the deck of the barge for the purpose of removing the bridle. Boards had been substituted for the original planking of the deck in and about the area where the draft had landed. The deck in that area appeared to be safe and able to support the weight of the longshoremen and cargo. As plaintiff stepped toward the draft, the board beneath him yielded and his right foot was thrust through the deck to his groin.

Defendant Navigation answers that the barge charter was not a demise; if indeed it was, then "the sublet to Scindia was not a demise" (Trial brief, p. 5), and a bareboat charterer is not liable for personal injuries arising from unseaworthiness due to a latent defect existing before the demise (Trial brief, p. 5).

"To create a demise the owner of the vessel must completely and exclusively relinquish possession, command and

navigation thereof to the demisee," *Guzman* v. *Pichirilo,* 369 U.S. 698, 699, 82 S.Ct. 1095, 1096 (1962). Petterson relinquished possession and control of the barge and placed Reel under Navigation's command. Charters of barges with "captains" in the employ of the owner are generally held to be demises.[2]

Navigation's argument that the "sublet" was not a demise rests on the relationship between Navigation and Scindia with reference to the barge. The original hiring of the barge was not for Scindia's account. Navigation acted independently in the hiring. It was the demise charterer of the barge. On March 18, when it assigned the barge to the service of the Jaladhanya it acted as agent for Scindia. Navigation did not surrender control of the barge. The services were performed pursuant to Navigation's direction and under its control. The claim against Scindia is based on the traditional concept of respondeat superior. A general agency agreement is not a maritime contract. *P. D. Marchessini & Co.* v. *Pacific Marine Corp.,* 227 F. Supp. 17, 18 (S.D.N.Y. 1964). *See also Admiral Oriental Line* v. *United States,* 86 F.2d 201 (2d Cir. 1936). As a general rule, federal law governs admiralty claims. Nevertheless, an accommodation is proper where local law

[2] In *Hastorf* v. *F.R. Long-W.G. Broadhurst Co.,* 239 Fed. 852 (2d Cir. 1917), an oral charter for a dumper-scow including a man to take care of her at $20 per day was held to be a demise. In *The Willie,* 231 Fed. 865, 867 (2d Cir. 1916), the court held: "Charterers of scows in this harbor, without motive power of their own and subject to orders and control of charterers, are treated as demises, even though the owner keeps a man aboard, called captain by courtesy," citing *Monk* v. *Cornell Steamboat Co.,* 198 Fed. 472, 117 C.C.A. 232. In *Aird* v. *Weyerhaeuser S.S. Co.,* 169 F.2d 606 (3d Cir. 1948), *cert. denied,* 337 U.S. 959, 69 S. Ct. 1521 (1949), where a barge was brought to defend its dock and left in defendants possession for the purpose of loading it with pipe, the court held defendants to be the demisee of the barge.

expands the rights flowing from a breach of a maritime duty, *Kossick* v. *United Fruit Co.,* 365 U.S. 731, 739, 81 S.Ct. 886, 892 (1961). The agent of an undisclosed principal is liable for its own acts, *Cleary Bros.* v. *Christie Scow Corp.,* 215 F.2d 740 (2d Cir. 1954), *The Falkefjell* v. *Arnold Bernstein Shipping Co. Inc.,* 223 F.2d 820 (2d Cir. 1955). The undisclosed principal is liable for the acts of its agent performed within the scope of the agency.

Defendant's final argument is that it is not liable for latent defects existing before the demise. The demise charterer is the owner of the barge *pro hac vice* and is liable for personal injuries to seaman, *Aird* v. *Weyerhaeuser S.S. Co., supra* at 610; *Cromwell* v. *Slaney,* 65 F.2d 940, 941 (1st Cir. 1933). The warranty of seaworthiness running from the owner to the charterer gives the charterer a right of indemnity for any loss the charterer sustains by reason of a latent defect existing at the time of the charter. *Connecticut Adamant Plaster Co.* v. *James McWilliams Blue Line Inc.,* 149 F. Supp. 122, 126 (S.D.N.Y. 1957), *aff'd,* 253 F.2d 785 (2d Cir. 1958). *The Doyle,* 105 F.2d 113 (3d Cir. 1939), cited by defendants (Trial brief p. 5) is not to the contrary.[3]

Turning to the defendant third-party complaint for indemnity against ITO, I find that the defect in the beams supporting the deck could not be discovered by a reasonable inspection. The stevedore's warranty to perform the

[3] The district court's decision is not reported. Nor is it explained in the Court of Appeals' reversal. It is clear, however, that the Court of Appeals recognized the right of duPont (the shipper of the lost cargo) to recover against Sheridan, the charterer of the Lighter Doyle. This court interprets the order of the Court of Appeals relating to impleading, as permitting a claim over for the loss suffered by the charterer against Cox, the owner of the lighter.

stevedoring services in a workmanlike manner does not obligate him to uncover defects not readily discoverable through a cursory examination. The defect in the support of the deck at the site of the injury was a latent defect. Third-party defendant's motion to dismiss the third-party complaint is granted, *Vaccaro* v. *Alcoa Steamship Company,* 405 F.2d 1133, 1138 (2d Cir. 1968).[4]

The court finds for the plaintiff and against Navigation and Scindia.

The court directs a trial on the issue of damages on February 22, 1977, at 10:00 A. M., and it is

So ORDERED.

/s/ JACOB MISHLER
U.S.D.J.

[4] Entry of judgment is stayed until the time of entry of judgment in favor of plaintiff.

APPENDIX B

Judgment of the Court of Appeals

(Entered October 17, 1977)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of October, one thousand nine hundred and seventy-seven.

Present:

HONORABLE PAUL R. HAYS,
HONORABLE MURRAY I. GURFEIN,
HONORABLE THOMAS J. MESKILL,
Circuit Judges.

77-7213

JOHN ESPOSITO,
Plaintiff-Appellee,

—against—

UNITED STATES NAVIGATION INC.

—and—

SCINDIA STEAM NAVIGATION CO. LTD.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED on the opinion of Chief Judge Mishler below.

PAUL R. HAYS
MURRAY I. GURFEIN
THOMAS J. MESKILL
Circuit Judges

APPENDIX C

Order of the Court of Appeals Denying Rehearing

(Filed January 4, 1978)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of January, one thousand nine hundred and seventy-eight.

Present:

HONORABLE PAUL R. HAYS,
HONORABLE MURRAY I. GURFEIN,
HONORABLE THOMAS J. MESKILL,
Circuit Judges.

77-7213

JOHN ESPOSITO,
Plaintiff-Appellee,

v.

UNITED STATES NAVIGATION INC., and SCINDIA STEAM NAVIGATION COMPANY, LTD.,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX D

Order of the Court of Appeals Denying Suggestion for Rehearing in Banc

(Filed January 4, 1978)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of January, one thousand nine hundred and seventy-eight.

77-7213

JOHN ESPOSITO,

Plaintiff-Appellee,

v.

UNITED STATES NAVIGATION INC., and SCINDIA STEAM NAVIGATION COMPANY, LTD.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge

APPENDIX E

Second Circuit Rule § 0.23

§ 0.23. Dispositions in Open Court or by Summary Order

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

Fifth Circuit Rule 21

Rule 21. Affirmance Without Opinion

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by

substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

Supreme Court, U. S.
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UNITED STATES NAVIGATION INC.,

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SCINDIA STEAM NAVIGATION CO., LTD.,

Petitioners,

vs.

JOHN ESPOSITO,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1977

No. 77-1296

UNITED STATES NAVIGATION INC.,

and

SCINDIA STEAM NAVIGATION CO., LTD.,

Petitioners,

vs.

JOHN ESPOSITO,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Court of Appeals unanimously affirmed the unreported judgment of the district court *on the opinion* of Chief Judge Jacob Mishler.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

STATEMENT

The instant case which petitioners desire to bring before this Court for review involves little more than a tort claim by respondent John Esposito, a longshoreman, who sued to recover damages for the personal injuries he sustained while working aboard a barge. Cargo was in the process of being discharged from a Scindia ship onto the barge on which respondent was working as part of a continuous operation, then to be transferred to another Scindia vessel berthed nearby. Petitioner United States Navigation had possession of the barge under a hiring for an indefinite term over which it exercised sole and exclusive dominion and control. The district court found, on the facts, that United States Navigation was a demise charterer of the barge with the concomitant duties of owner *pro hac vice* (5a),[1] the predicate for its liability to respondent for the personal injuries he sustained due to the unseaworthy condition of the barge. The court also held Scindia liable as the principal for whom United States Navigation was agent.

The issues before the trial court (non-jury) were just another instance of an injury to a longshoreman who derived his right of action from *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1090 (1946), and the plethora of cases that followed, including *Gutierrez v. Waterman Steamship Corp.*,

1. Refers to page number in appendix to petition.

373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 297 (1962), and others, which extended the shipowner's liability shoreward to the pier, and beyond.

This case presents no questions of import to bring it within the ambit of those considerations governing review on certiorari as outlined in Rule 19 of the Rules of the Supreme Court; nor is any factual aspect of the case, or the opinion of Chief Judge Jacob Mishler, novel, unique, of first impression or of public interest warranting intervention at this stage of the judicial process.

Moreover, petitioners' contentions and supporting arguments have already been considered four times, once before Chief Judge Mishler, and on three separate occasions by the circuit court of appeals — a distinguished bench. More recently, an application for a stay presented to the Hon. Thurgood Marshall was also denied.

ARGUMENT

RESPONDENT'S REASONS FOR DENIAL OF THE WRIT (COMMENTING ON PETITIONERS' POINTS)

"I."

If, *arguendo*, petitioner United States Navigation is correct in its assertion that the question it raises has commercial importance — namely, its need, and that of shipping agents similarly situated, to now obtain insurance coverage to protect themselves against non-negligent liability for pre-demise unseaworthiness, I direct the Court's attention to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, Ch. 509 §1, 44 Stat. 1424, which renders this issue moot.

The accident at bar occurred March 18, 1969, and because the 1972 amendments to §905 were not applicable to injuries

sustained prior to the effective date of the amendments (*Scalafani v. Moore McCormack Lines, Inc.*, 388 F. Supp. 897 (D.C.N.Y. 1975), *aff'd.*, 535 F.2d 1242; *Reyes v. Marine Enterprises Inc.*, 494 F.2d 866 (1st Cir. 1974)), the long line of cases involving injuries to longshoremen to whom was owed the duty to provide a seaworthy vessel pertained.

The purpose of the 1972 amendments was to relieve vessels of liability to longshoremen for damages under the admiralty doctrine of unseaworthiness and to eliminate the vessel's action for indemnity against the stevedoring company. The reference to "vessel" in §905(b) includes not only the vessel itself, but its owner, owner *pro hac vice*, agent, operator, charter or bare boat charterer, master, officer or crew members §18(b), 33 U.S.C. §902(21).

Therefore, petitioners' argument that commercially important questions are raised which should be settled is of no consequence because the longshoremen can no longer sue for non-negligent injuries or for pre-demise unseaworthiness.

In regard to the issues presented herein, it is settled law that charters of barges without motor power, in local harbors, are demises, from which it naturally follows that the demisee is looked upon as the owner *pro hac vice* of the barge. The charterer is therefore subject to all of the duties and responsibilities of ownership and stands liable in personam for a breach of its duty to provide a seaworthy vessel and a reasonably safe place to work. *Dailey v. Carroll*, 248 Fed. 466 (2d Cir. 1917); *The Willie*, 231 Fed. 865, 152 C.C.A. (2d Cir. 1916); *Hastorf v. F. R. Long — W. G. Broadhurst Co.*, 239 Fed. 852 (2d Cir. 1917); *Leary v. United States*, 14 Wall 607, 81 U.S. 607, 20 L. Ed. 756.

In the case at bar, the district court found, as a fact, that United States Navigation was in possession and control of the barge for nineteen (19) days and entitled to divert its navigation

and employment, which it did (4a). As an owner *pro hac vice*, United States Navigation had the duty to furnish a seaworthy barge and the concomitant obligation to provide longshoremen, such as respondent, with a safe place to work. The district found that it breached this duty. The issue was uncomplicated and the findings supported by ample precedent.

The cases to which petitioners allude are inapposite for they relate to self-propelled navigational vessels and are otherwise distinguishable on the facts. Petitioners misconceive that a special rule of law applies to barges, which, in the opinion of *Dailey v. Carroll, supra*, rests on "the nature and exigencies of harbor business only."

"II."

The district court could have relied on alternative principles of law in the imposition of liability as to Scindia (shipowner), *i.e.*, the longshoreman (respondent) was working in the service of the ship performing an integral part of the unloading of petitioners' cargo vessel. *The Pennsylvania Railroad Company v. McAllister Brothers, Inc.*, 137 F. Supp. 788, *aff'd*, 240 F.2d 423 (2d Cir. 1957)[2]; *Hagans v. Ellerman & Bucknall Steamship Co.*, 318 F.2d 563 (3d Cir. 1963). Instead, Chief Judge Mishler applied the law of agency (5a) and held Scindia liable for its agent's acts which were performed within the scope of its agency — basic "hornbook law". There is nothing remarkable about this concept to invite further judicial intervention.

"III."

The thrust of petitioners' argument to justify review by this Court is what they choose to refer to as a summary affirmance by the court of appeals, but neglect to include the critical words: "on the opinion of Chief Judge Mishler below."

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2. In the district court action, on substantially similar facts, the predecessor law firm to petitioners' present attorneys admitted liability to the longshoreman.

If the circuit court recited Judge Mishler's opinion verbatim, and concluded with the words: "Appellants contentions are without merit. Affirmed.", could it be said that the court rendered a summary affirmance?

It is undisputed that there is an ever-increasing caseload of federal judicial business, especially in the Second Circuit. This monumental task has led to the promulgation of Rule §0.23 which, in the proper case, authorizes a summary disposition. This is not to say that a summary affirmance is indiscriminately rendered; there is a careful judicial screening and safeguards to assure the proper disposition of a case. As was stated in *N.L.R.B. v. Amalgamated Clothing Workers of America,* 430 F.2d 966 (5th Cir. 1970):

> ". . . in a number of cases there is no real need for an opinion at all. Where in a given case that is the considered judicial judgment of three Judges comprising a panel, then it is perfectly obvious that the now limited and precious judicial resources can be husbanded by a procedure which eliminates that unnecessary opinion."

The Supreme Court is faced with an even more gargantuan burden with the inordinate number of petitions for a writ of certiorari and can well appreciate the necessity to screen the cases to ascertain those that have precedential value. In the words of Mr. Justice Rehnquist in the case of *Taylor v. McKeithen,* 407 U.S. 191, 32 L. Ed. 2d 648, 92 S. Ct. 1980:

> "I think decisions as to whether opinions should accompany judgments of the courts of appeals, and the desirable length and content of those opinions are matters best left to the judges of the courts of appeals."

The ultimate question, therefore, is not whether the court of appeals has too much latitude, but whether the particular case is an appropriate candidate for elucidation.

In the case at bar, the circuit court of appeals did express its views when it adopted the opinion of Chief Judge Mishler.

It is evident that petitioners have failed to present a convincing argument that this case involves questions or principles of law important to others than the parties litigant. The decision below does not involve a precedential question of federal law which should be settled by this Court; the questions of law are not of public importance or affect large public interests, and, more significantly, the issues have been moot since the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Succinctly stated, Rule 19 has not been satisfied.

CONCLUSION

For the enumerated reasons, which have eroded petitioners' arguments, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ L. Richard Fodera

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1296

UNITED STATES NAVIGATION INC.,

and

SCINDIA STEAM NAVIGATION CO., LTD.,

Petitioners,

—against—

JOHN ESPOSITO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Replying *seriatim* to respondent's reasons for denying the writ:

I

Respondent concedes by avoidance the validity of petitioners' declaration that holding a non-negligent demisee liable for injury caused by latent pre-demise unseaworthiness is unprecedented, but argues that amended § 5(b) of the Longshoremen's and Harbor Workers' Com-

pensation Act, 86 Stat. 1263, § 18(a), 33 U.S.C. 905(b), moots the importance of the holding.

Amended § 5(b) abolished unseaworthiness liability only to injured longshoremen and other compensated harbor workers, and does not affect unseaworthiness liability to injured seamen and damaged cargo and vessel owners.

II

Respondent detracts from the erroneous holding that a demisee's undisclosed principal is liable for unseaworthiness on ground of *respondeat superior* by arguing that the Court of Appeals may have affirmed *sub silentio* because respondent was unloading the principal's ship.

If that was the Court of Appeals' rationale, it conflicts with *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), reh. den. 404 U.S. 1064 (1972), which distinguished *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963), reh. den. 374 U.S. 858 (1963), because: "The decision in *Gutierrez* turned, not on the 'function' the stevedore was performing at the time of his injury, but, rather, on the fact that his injury was caused by an appurtenance of the ship * * *.", 404 U.S., pp. 210-211. No decision, including that below, holds that a barge tied to a pier 15-25 feet astern of a ship is an appurtenance of the ship.

III

Respondent argues that the Court of Appeals' affirmance was not summary because it was "on the opinion of Chief Judge Mishler below" (app'x B to petition).

Because Judge Mishler's opinion either vitiates or transforms fundamental law, the Court of Appeals' unexplained affirmance was inappropriate.

Respectfully submitted,

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